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IN THE

Supreme Court of the United States

October Term, 1941.

No. 1183.

LENA L. BUSH,
Petitioner,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Respondent.

BRIEF OF RESPONDENT, CONTRA, PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Opening statement 1
Vermont has not passed on this question..... 4
The law of the state of incorporation is applicable.. 6
The law of Ohio..... 7
Case involves no question of general public interest. 10

Cases and Authorities Cited.

Aetna Life Ins. Co. v. Ryan, 255 Fed., 483..... 2
Aetna Life Ins. Co. v. Dorney, 68 Ohio St., 151, 27 N. E., 254 7
Bowen v. N. Y. Life Ins. Co., 33 Fed. (S), 705..... 5
Clark v. Employers' Liability Assurance Co., 72 Vt., 458, 48 Atl., 639.....2, 4
Commercial Travelers Mutual Accident Ass'n v. Fulton, 79 Fed., 423 (C. C. A. 2)..... 2
Corsones v. Monarch Ins. Co., 103 Vt., 379, 154 Atl., 693 4
Crandall v. Continental Casualty Co., 179 Ill. App., 330 3
Erie R. R. Co. v. Tompkins, 304 U. S., 64..... 2

Griswold v. Metropolitan Life Ins. Co., 107 Vt., 367, 180 Atl., 649 4

Hull v. Metropolitan Life Insurance Co., 36 N. E. (2), 866 7

Ins. Co. v. Bowman, 99 Fed. (2), 856 5

Modern Woodmen of America v. Mixer, 267 U. S., 544, 69 L. Ed., 783 6

Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S., 234, 56 L. Ed., 419 7

Oliver v. Iowa State Traveling Men's Ass'n, 76 Fed. (2), 963 7

Order of The United Commercial Travelers v. Nicholson, 9 Fed. (2), 7 (C. C. A. 2) 2

Penn v. Standard Life and Accident Insurance Co., 158 N. C., 29, 73 S. E., 99 3

Railway Mail Ass'n v. Weir, 156 N. E., 921 7

Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St., 360, 83 N. E., 491 8

Ruhlin v. New York Life Ins. Co., 106 Fed. (2), 921. 7

Supreme Council Royal Arcanum v. Green, 237 U. S., 531, 59 L. Ed., 1089 6

The Order of United Commercial Travelers of America v. Sevier, 121 Fed. (2), 650 5

Van De Water v. United Commercial Travelers, 77 Fed. (2), 331, 7 Fed. (S.), 369 6

Woodmen of the World v. Bolin, 305 U. S., 66 6

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The statement of matter involved is fairly set forth in the petition for writ of certiorari and the main issue raised in this case refers to the liability of the respondent

where the facts show that a pre-existing diseased condition was aggravated by the effects of an accident and the combination of the two resulted in death.

The contractual provision is as follows:

> "* * * the results of bodily injury * * * effected solely through external, violent and accidental means, * * * which shall be occasioned by the said accident alone and independent of all other causes."

There can be no question but that the rule in the Second Circuit prior to the Supreme Court's decision in Erie R. R. Co. v. Tompkins, 304 U. S., 64, was to the effect that under such circumstances there was no liability. Aetna Life Ins. Co. v. Ryan, 255 Fed., 483; Order of The United Commercial Travelers v. Nicholson, 9 Fed. (2), 7 (C. C. A. 2); Commercial Travelers Mutual Accident Ass'n. v. Fulton, 79 Fed., 423 (C. C. A. 2). The Circuit Court of Appeals looked to the laws of Vermont and determined that, in the case of Clark v. Employer's Liability Assurance Co., 72 Vt., 458, 48 Atl., 639, the law of Vermont was similar to the law as previously expressed by the Second Circuit and affirmed the action of the court below in directing a verdict for respondent at close of the testimony offered by petitioner.

The petitioner claims that because the word "indirectly" was used in the policy involved in the Clark case and because the English cases cited in the Clark case did not contain the "indirect" provision, that if the Supreme Court of Vermont was confronted with a contract such as involved in the instant case, that court would hold, contrary to the decision in the Clark case, that the company was liable.

In the majority opinion below, in commenting on this phase of the matter, the court said:

> "It is argued that the Clark decision differs because the word 'indirectly' used in the policy there was broader than the words 'due to accidental means alone and independent of all other causes.' We can see no practical difference and regard the Clark decision as directly in favor of the defendant's position."

The so-called "redundant clause" was specifically held as surplusage and unnecessary in the cases of Crandall v. Continental Casualty Co., 179 Ill. App., 330, and Penn v. Standard Life and Accident Insurance Co., 158 N. C., 29, 73 S. E., 99 (on rehearing, 76 S. E., 262). In the Crandall case the court, in considering this question, said:

> "In considering the various cases arising on accident insurance contracts containing similar provisions, we must bear in mind that the policy under consideration here is not one with the general undertaking to answer in case of * * * death from accidental causes, with a clause excepting specific causes and thus limiting the general liability * * *. There are * * * cases where the undertaking is limited, as in this case, by its own terms as first stated, yet followed by exceptions of specified causes, that, without such express exceptions, could not have fallen within the stipulated undertaking to pay. This form of policy seems to have been quite usual in the time of the earlier cases and less common in later years. We see no difference in construction of an insurance contract where the undertaking is as first stated clearly to answer only for death from some limited cause or causes, whether it is followed by express exceptions of some cause not there included, or not. If the stipulation be to pay in case of death from poison, it is immaterial whether or not it be followed

by an express provision that the insurer will not be liable in case of death from some other specified cause. The plaintiff must aver and prove death from poison. Yet, in discussing cases containing such useless exceptions, the courts have often naturally referred to them as express provisions that the insurer would not be liable in such event. The legal effect of the policy is the same whether the redundant provision is present or not."

Vermont Has Not Passed Upon This Question.

Three Vermont cases (Corsones v. Monarch Ins. Co., 103 Vt., 379, 154 Atl., 693; Griswold v. Metropolitan Life Ins. Co., 107 Vt., 367, 180 Atl., 649, and Clark v. Employers' Liability Assurance Co., supra), are cited in the brief of the petitioner and in the decision of the Circuit Court of Appeals bearing upon this question. Neither the Corsones nor the Griswold case have any bearing upon the question at bar. In the Corsones case the accident caused a disease or condition which had not existed before which disease or condition caused the death. As the Court of Appeals stated in commenting upon this case:

> "It might have been different if the fall had aggravated a pre-existing hernia and the hernia had together effected the death of the insured."

In the Griswold case the deceased was hit by a piece of wood and in turn septic infection developed which caused his death. As the Court of Appeals stated:

> "The infection did not precede the accident but was set up by it."

Both of these cases, therefore, are simply a recognition of the well established rule that where an accident causes a disease and the disease causes death, such death is the result of accidental means alone and independent of all other causes.

The Clark case, as stated above, holds that, under a contract, as contained in the instant case, with the addition of the so-called "redundant clause," there can be no liability under the facts as presented in the case at bar. The Circuit Court of Appeals could see no practical difference between the instant case and the Clark case. But if the Clark case is not an authority for the respondent then neither is it authority in favor of the petitioner and in such a case the law previously laid down in the Circuit Court will control. Thus, in the very recent case of The Order of United Commercial Travelers of America v. Sevier, 121 Fed. (2), 650, it was held that where neither Missouri nor Ohio had construed the particular provision of a contract the federal court would exercise its own judgment. See also Ins. Co. v. Bowman, 99 Fed. (2), 856. And in the case of Bowen v. N. Y. Life Ins. Co., 33 Fed. (S), 705, aff. 117 Fed. (2), 298, Cert. Den. 313 U. S., 583, it was held that the federal court sitting in Missouri was required to apply pertinent rulings, if any, of the courts of Missouri but that if there was no Missouri authority on the subject involved, the law as announced by the Federal Circuit Court of Appeals for that circuit would control.

The Law of the State of Incorporation Is Applicable.

The respondent is a fraternal beneficiary society (P. Ex. 5 (C.), R. 42) incorporated under the laws of the state of Ohio (P. Ex. 5 (1) R. 40) and, therefore, the rights of the members and their beneficiaries are to be determined according to the laws of Ohio.

Supreme Council Royal Arcanum v. Green, 237 U. S., 531, 59 L. Ed., 1089;
Modern Woodmen of America v. Mixer, 267 U. S., 544, 69 L. Ed., 783;
Van De Water v. United Commercial Travelers, 77 Fed. (2), 331, 7 Fed. (S.), 369;
Woodmen of the World v. Bolin, 305 U. S., 66, 83 L. Ed., 45.

The last act necessary to consummate this contract and make it binding between the parties took place at Columbus, Ohio, at 12 o'clock noon on the day the certificate was dated, no delivery of certificate to the insured being necessary in order to make a binding contract (P. Ex. 5 (1), R. 40-41). The court's attention is directed to the fact that the certificate sued upon in this case was executed at Columbus, Ohio, March 23, 1933, and by its terms took effect "at twelve o'clock noon, standard time, on the day this certificate is dated * * *." The last act necessary to bring the contract into effect, therefore, took place in Columbus, Ohio, on March 23, 1933, and under the recognized and uniform decisions of this court the

contract is to be construed according to the place where the contract is made.

Ruhlin v. New York Life Ins. Co., 106 Fed. (2), 921, Cert. Den. 60 S. Ct., 469;
Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S., 234, 56 L. Ed., 419;
Oliver v. Iowa State Traveling Men's Ass'n., 76 Fed. (2), 963, Cert. Den. 296 U. S., 582, 80 L. Ed., 412.

THE LAW OF OHIO.

The Ohio situation is comparable to that in Vermont to the extent that in three cases the court had before it contracts containing the "redundant" clause.

Aetna Life Ins. Co. v. Dorney, 68 Ohio St., 151, 27 N. E., 254;
Railway Mail Association v. Weir, 156 N. E., 921, and
Hull v. Metropolitan Life Insurance Co., 36 N. E. (2), 866.

In the Dorney case, supra, the trial court refused to give the following instruction:

> "If you find from the facts and circumstances proved that the coats of the stomach of the said Dorney had been eaten through by an ulcer and was left in a weakened and diseased condition and that but for such diseased and weakened condition of his stomach the injury which caused his death would not have resulted from anything he did on October 23, 1933, then and in that case the plaintiff cannot recover and the verdict must be for the defendant."

In the opinion the Supreme Court said:

> "The instruction requested was pertinent in view of the stipulations of the policy, the issues of fact

made by pleadings, and the evidence offered by the plaintiff below."

And in the Weir case, supra, the court said on page 923:

"The Supreme Court of Ohio in Aetna Life Ins. Co. v. Dorney, 68 Ohio St., 151, 27 N. E., 254, holds that no recovery could be had on an accident policy where a pre-existing disease had contributed to the death * * *. In the case of Western Commercial Travelers' Ass'n. v. Smith, 85 F., 401, 40 L. R. A., 653, the United States Circuit Court of Appeals of the Eighth District laid down the rule as follows:

'If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such a bodily infirmity that a short run, followed by stooping, which would not have injured a healthy man, produced apoplexy (Insurance Co. v. Selden, 24 C. C. A., 92, 78 F., 285), the association was exempt from liability because the death was caused partly by disease and partly by accident.'"

However, in Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St., 360, 83 N. E., 491, the Supreme Court of Ohio quite clearly and unequivocably stated that the "indirect" clause was redundant. The contractual provision in the Rheinheimer case was substantially similar to the provision found in the Clark case, supra, for after setting forth the usual insuring clause providing for indemnity for "death resulting solely from bodily injury effected through external, violent and accidental means," the

policy contained the further provision that "this insurance does not cover in event of accident or death, resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form, proximate or contributory, as a primary, secondary or final cause of accident, injury, disability or death."

In discussing this "disease" clause above quoted, the court, on page 381, said:

> "These words are literally taken from the clause of the policy quoted, and we know of no rule that requires the court to charge a proposition as law, which is contained in the technical language of the contract. The court, in charges given, had stripped from the real issue some of these qualifying words which to the jury might seem mysterious, and which might even confound them, and gave their support and meaning in clear and simple terms. **For if the accident was the sole cause of death, and it was so caused independently of any other cause, then it did not result partly from any other cause, and if the accident was the sole and proximate cause of death, then it did not result, directly or indirectly, from any other cause.** And if the accident was the sole and proximate cause, it was the primary, and not the secondary or contributory cause. It seems to us the above special instructions given at the defendant's request, and the general charge, covered the terms of the exception in the policy, and the court sufficiently and correctly construed the policy. **The qualifying words, above noted, were contained, in whole or in part, in several of the rejected instructions, and the same comment applies to them."**

Case Involves No Question of General Public Interest.

The affidavit of the supreme secretary of the respondent association, filed herein with this brief, shows that there are issued and outstanding in the state of Vermont but 363 contracts of insurance to members of this association. In view of this situation, it can hardly be said that this case involves any question of general public interest.

Again, it is quite apparent that the petitioner is not seeking to have this court lay down any broad rule of law for future guidance but rather is asking this court to review the decision of the Circuit Court of Appeals in determining what constitutes the law of Vermont—or, more correctly, what might constitute the law of Vermont in the event a case similar to this one were presented to the highest court of that state.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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